Supreme Court, U.S.
FILED
SEP 6 1979
MICHAEL RODAK, JR., CLERK

No. 78-1744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ALBERT BERLAND,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION

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Printed by the Authority of the State of Illinois—8-79-40

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT OF CERTIORARI	11

I.

THE DECISION OF THE ILLINOIS APPELLATE COURT REVERSING THE CONVICTION OF PETITIONER FOR ARSON WITH INTENT TO DEFRAUD AN INSURER DID NOT OPERATE AS AN ACQUITTAL OF THE PETITIONER; THEREFORE, THE ILLINOIS SUPREME COURT'S GRANT OF DISCRETIONARY REVIEW AND SUBSEQUENT REVERSAL OF THE DECISION OF THE APPELLATE COURT WAS PROPER AND DID NOT OFFEND THE PROSCRIPTIONS AGAINST DOUBLE JEOPARDY. THIS ISSUE WAS NOT RAISED UNTIL THE PETITION FOR REHEARING IN THE ILLINOIS SUPREME COURT AND IS THEREFORE WAIVED FOR PURPOSES OF REVIEW IN THIS COURT 11

II.

THE DECISION OF THE SUPREME COURT OF ILLINOIS, AFFIRMING THE JUDGMENT OF THE TRIAL COURT THAT THE PETITIONER WAS GUILTY OF ARSON WITH INTENT TO DEFRAUD AN INSURER, WAS SUPPORTED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THE RECORD DOES

Page

NOT SUPPORT ANY REASONABLE HYPOTHESIS OF PETITIONER'S INNOCENCE. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI 15

III.

THE PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL WAS PRIVATELY RETAINED, THE PETITIONER'S DEFENSE AT TRIAL DID NOT CONFLICT WITH THAT OF THE CO-DEFENDANT AND THERE IS NO SHOWING THAT A DIFFERENT RESULT WOULD HAVE OBTAINED HAD THE PETITIONER AND THE CO-DEFENDANT PROCURED SEPARATE COUNSEL. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI 20

CONCLUSION 27

AUTHORITIES CITED
CITATIONS

Cases:	Page
Burks v. *United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed2d 1 (1948)	14
Fry Roofing v. *Wood,* 344 U.S. 157, 73 S.Ct. 204, 97 L.Ed2d 168 (1952)	16
Glasser v. *United States,* 315, U.S. 60, 62 S.Ct. 457, 86 L.Ed 680 (1942)	24
Hanson v. *Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed2d 1283 (1958)	13
Holland v. *United States,* 348 U.S. 121, 75 S.Ct. 127 99 L.Ed. 150 (1954)	16
Holloway v. *Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed2d 426 (1978)	24, 25
Lollar v. *United States,* 376 F.2d 243 (D.C. Cir. 1967)	26
People v. *Berland,* 74 Ill.2d 286, 385 N.E.2d 649 (1979)	16, 17, 21, 24
People v. *Craig,* 47 Ill. App. 3d 242, 361 N.E.2d 736 (1st Dist. 1977)	22
People v. *Mallett,* 45 Ill.2d 388, 259 N.E.2d 241 (1970)	12
People v. *Powell,* 72 Ill.2d 50, 377 N.E.2d 803 (1978) cert. den. 99 S.Ct. 1214, 59 L.Ed.2d 455 (1979)	13, 14
People v. *Schwartz,* 58 Ill.2d 274, 319 N.E.2d 33 (1974)	13
People v. *Somerville,* 42 Ill.2d 1, 245 N.E.2d 461 (1969)	22, 24
People v. *Taylor,* 32 Ill.2d 165, 204 N.E.2d 734 (1965)	16
Smith v. *Regan,* 583 F.2d 72 (2d Cir. 1978) cert. den. 435 U.S. 406	23
Thacker v. *Bordenkircher,* 590 F.2d 640 (6th Cir. 1979)	25
United States v. *Boudreaux,* 502 F.2d 557 (5th Cir. 1974)	25
United States v. *Cox,* 580 F.2d 317 (8th Cir. 1978) cert. den. 99 S.Ct. 581	26
United States v. *Eaglin,* 571 F.2d 1069 (9th Cir. 1977)	23

United States v. *Foster*, 469 F.2d 1 (1st Dist. 1972) 25
United States v. *Gaines*, 529 F.2d 1038 (7th Cir. 1976) 25
United States v. *Johnston*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed 925 (1925) 16
United States v. *Lawriw*, 568 F.2d 98 (8th Cir. 1977) 26
United States v. *Mandell*, 525 F.2d 671 (7th Cir. 1975) cert. den. 423 U.S. 1049. ..... 23, 25, 26
United States v. *Medel*, 592 F.2d 1305 (5th Cir. 1979) 23
United States v. *Paz Sierra*, 367 F.2d 930 (2d Cir. 1966) 25
United States v. *Steele*, 576 F.2d 111 (6th Cir. 1978) cert. den. 99 S.Ct. 313 ..... 22, 23
United States v. *Valenzuela*, 521 F.2d 414 (8th Cir. 1975) cert. den. 424 U.S. 916 (1976) 23
United States v. *Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed. 2d 232 (1975) 14

Statues

U.S. Const. amend. V 13
Ill. Const. art. VI § 6 13
Ill. Rev. Stat. 1977, ch. 110A, § 315, 367 ..... 12, 13
Ill. Rev. Stat. 1969, ch. 38, § 5-2, 20-1(a)(b) 16

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District, is reported as *People* v. *Albert Berland et al.*, 52 Ill. App.3d 96, 376 N.E.2d 181 (1st Dist. 1977). The opinion of the Illinois Supreme Court, reversing the judgment of the Illinois Appellate Court, is reported as *People* v. *Albert Berland, et al.*, 74 Ill.2d 286, 385 N.E.2d 649 (1979).

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for a Writ of Certiorari. However, as treated more fully within the following argument, the respondent does not believe that the petitioner has shown any good reason for this Court to exercise its sound judicial discretion to grant his petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Supreme Court's grant of discretionary review of the State's Appeal of a decision of the Illinois Appellate Court reversing without remandment the petitioner's conviction, *inter alia,* due to the sufficiency of the evidence, comports with the Double Jeopardy Provisions of the Illinois and United States Constitutions where the Illinois Supreme Court reinstated the conviction and did not order a new trial, and whether the petitioner has waived this issue for purposes of review.

2. Whether the decision of the Illinois Supreme Court affirming the judgment of the trial court that the petitioner was guilty of arson with intent to defraud an insurer was proper where the trial court's finding was based on the overwhelming weight of the evidence and the trial court record does not support any reasonable hypothesis of innocence.

3. Whether the petitioner received the effective assistance of counsel where counsel was privately retained, the petitioner's defense at trial did not conflict with the codefendant and there is no showing that a different result would have obtained had the petitioner and the codefendant procured separate counsel.

STATEMENT OF THE CASE

THE PROCUREMENT OF THE FIRE INSURANCE AND THE PETITIONER'S POSSESSION OF THE PREMISES AS A LOSING FINANCIAL INVESTMENT.

The subject premises in the instant case, a partially occupied, multi-unit, three story, dilapidated apartment building, located at 715 South Lawndale Street in Chicago, Illinois, was partially consumed in an arson fire on November 19, 1969. The building was purchased by the petitioner for $18,000 in 1966. (People's Exhibit Number 5, at 5)[1] On June 30, 1969, an application for fire insurance was received by the Illinois Fair Plan Association. The application was submitted on behalf of the Lawndale National Bank, Trust Number 4946, with the petitioner, Albert Berland, listed as the owner of the subject building. The petitioner listed the value of the property as $125,000 and requested $100,000 worth of coverage. The application contained the question, "give the applicant's five-year loss record for fire and extended coverage perils." (R. 71) (People's Exhibit No. 9). The petitioner stated on the application that he had no history of fire losses in the five years prior to the application date of the policy. (People's Exhibit No. 10) Since 1967, and prior to the fire, the petitioner sustained fire losses at eight separate locations. (People's Exhibit Nos. 5 at 15, 17, 18, 20, 21, 24, 26, 27, 28) Albert Berland's signature appeared on the policy. (R. 63-65)

Prior to submitting the application, the petitioner brought it to the office of Wolf, his codefendant below, to have it notarized. (People's Exhibit No. 8, p. 415) The application

[1] R. designates the transcript of record. R.C designates the common law record. People's Exhibit refers to those exhibits introduced into evidence at evidence at trail by the People, the respondent here. Pet. Post-Trial Exhibit refers to those exhibits introduced into evidence during the arguments on petitioner-defendant's post-trial motions.

was purportedly notarized by Maurice Blumenthal on June 20, 1969, (People's Exhibit No. 9) which was slightly over nine months after Blumenthal's death in an automobile accident. (People's Exhibit No. 13) The statement on the notary license said that it would expire in November of 1970. However, if Blumenthal had lived his license would have expired in February, 1971. (People's Exhibit No. 12)

On August 13, 1969, the American Casualty Company of Reading, Pennsylvania, a member of the Fair Plan Group, (R. 66) issued a $100,000 insurance policy on 715 South Lawndale for the period of one year. (People's Ex. No. 9; R. 67-69)

On August 12, 1968, over 35 building code violations were found in, on and around the building by a city building inspector. The City of Chicago filed a suit against the Lawndale National Bank as trustee for the property at 715 South Lawndale and against Fred Cooper (An alias used by petitioner Berland) for necessary repairs. (People's Exhibit No. 5 at 28-29; People's Exhibit No. 14, *City of Chicago* v. *Lawndale National Bank, Trust No. 4846,* 68 CH 54452) It was ordered that the code violations be corrected by July 1, 1969. (People's Group Ex. No. 14) This order was continued. A hearing on the order was scheduled for November 20, 1969, but on November 19, 1969, the day before the hearing, the building was set on fire and burned. (People's Group Ex. No. 14)

The petitioner had attempted to sell the property at 715 South Lawndale. During the two years prior to the fire of November 19, 1969, the petitioner sold the building on contract three times. For one reason or another every buyer defaulted on the purchase of the building. (People's Exhibit No. 5 at 59-62)

During the two years prior to the fire of November 19, 1969, the petitioner had steadily been losing money on the property. At the beginning of that period he was receiving

about $650.00 per month. (People's Exhibit No. 5 at 104) Then he began having trouble collecting rent and his monthly proceeds dropped to $300 and then $200. In the month prior to the fire he collected about $250 in rent payments. Only two of the four tenants were paying rent. (People's Exhibit No. 5 at 104) The Building was two-thirds vacant. (Id. at 5)

THE PETITIONER'S RELATIONSHIP TO HIS CO-DEFENDANT AND THEIR JOINT ACTIVITIES WITH RESPECT TO THE SUBJECT PROPERTY.

Even prior to petitioner's purchase of the property located at 715 South Lawndale, Wolf, his codefendant, was heavily involved with him regarding that building. Wolf conducted the preliminary negotiations with seller of the property on behalf of petitioner. (R. 465) Petitioner represented himself to be a real estate broker and represented Wolf to be the buyer. (People's Exhibit No. 3; R. 486-487) The original contract was signed by Wolf in his name or the name of his nominee. (R. 477-478) Wolf then gave the contract to petitioner who made an agreement to have the Lawndale National Bank take title for him. (R. 480)

At one point the beneficiary of the trust holding 715 South Lawndale was listed as "Fred Cooper." (People's Exhibit No. 5 at 68; People's Exhibit No. 14) Fred Cooper was an alias used by petitioner in some of his real estate transactions. (People's Exhibit No. 5 at 70) The addresses listed for Cooper were 1614 South Kedzie and 2840 North Broadway. (People's Exhibit No. 14) In fact, "Fred Cooper" did not reside at either of these locations. Those locations were the business addresses of Louis Wolf. (People's Exhibit No. 4, at 56; People's Exhibit No. 3 at 72, 75)

Wolf loaned petitioner some money and petitioner executed an assignment of collateral in the property at 715 South Lawndale to William Berke until petitioner had repaid Wolf. (R. 503) Berke was Wolf's nephew and Wolf listed William

Berke as a beneficiary for the purpose of insuring that property would pass to Berke if Wolf died. (People's Exhibit No. 2 at 16, 39)

Wolf performed duties concerning the upkeep at 715 South Lawndale. He referred subcontractors to petitioner. (People's Exhibit No. 3 at 121) He ordered coal for the building. (People's Exhibit No. 5 at 127) Wolf stated that he looked after the building because it was a problem. (R. 502) In fact, soon after petitioner purchased the property Wolf offered his services to petitioner to help him find good tenants to live there. (People's Exhibit No. 5 at 65-66) When Wolf collected the rents it was at petitioner's request. (R. 498-499) In approximately the four years in which petitioner owned the building, Wolf collected rents for him on at least ten occasions. (R. 499)

Wolf's significant involvement with the building also involved filing lawsuits, in his own name, on petitioner's behalf. Wolf filed a lawsuit against Thelma Dillon, a tenant in the building located at 715 South Lawndale, for forcible entry and detainer. (R. 511; People's Exhibit No. 28, Wolf v. Dillon, 69 MI 80679, filed October 14, 1969).

THE ARSON FIRE

On November 19, 1969, the premises at 715 South Lawndale, Chicago, Illinois, were set on fire and were permanently damaged.

Evelyn Mayberry testified that, on the date of the fire, she lived at 716 South Lawndale in an apartment across the street from the subject premises. Two men in a dark colored station wagon pulled up on Lawndale Street going north. They parked on the east side of the street and sat in the car for a while looking up and down the block. It appeared as if they were watching to see if anyone was coming. The man on the driver's side exited and took a gasoline can out of the back of the station

wagon. He went into the building at 715 South Lawndale. Then the other individual took a ladder out of the station wagon and also entered the building at 715 South Lawndale. Mrs. Mayberry identified Louis Wolf as the man who carried the gasoline can into the building. (R. 134-139)

Mrs. Mayberry recognized the first individual, the one who took the gas can out of the automobile, because she had seen him the previous Sunday, November 16, 1969. That day Wolf and another man were parked in the alley just east of her apartment building. She watched him for about five minutes that day. On the Monday prior to the fire she saw Wolf taking the locks off 715 South Lawndale. Again, he was accompanied by another individual. On Tuesday, Wolf and another man drove by the building two or three times in a dark colored station wagon. (R. 140-141)

Albert Kyles testified that on the morning of November 19, 1969, he was sitting on the front steps of the apartment building, directly across from 715 South Lawndale. He saw two men in a station wagon pull up in front of the building and park across the street from where he was sitting. Both men exited from the car. The driver carried a gas can and the other man went around to the back of the station wagon and took out a ladder. Mr. Kyles saw both men enter the building. In court, Mr. Kyles identified Wolf as the man who was the driver of the car. (R. 105-107) Albert Kyles had seen Wolf collect the rent from his aunt who had previously lived in the building at 715 South Lawndale. (R. 111, 128) Kyles had even once paid the rent to Wolf himself. (R. 130) Wolf stated that he had possibly collected the rent at 715 South Lawndale as many as ten times. (R. 499)

Wolf was carrying the gasoline can and was leaning to one side, as if there was something in the can. The men went into the building and exited a few minutes later. When Wolf came

out of the building Mr. Kyles noticed that he was swinging the gas can as if it were empty. The two men got into the car and drove off. (R. 108-109)

After several minutes elapsed Mr. Kyles noticed that there was smoke coming from the building at 715 South Lawndale. The fire department arrived and Mr. Kyles remained at the scene.

At trial Wolf presented an alibi defense which the Illinois Supreme Court later characterized as a "recent concoction," and being of "recent origin." The Court held that "The identification was strong and the alibi was impeached." *People* v. *Berland, supra,* 74 Ill. 2d at 307.

After the blaze at 715 South Lawndale was extinguished, Lieutenant Francis Raymond Burns, a fire investigator, employed by the Chicago Fire Department, entered the premises at 715 South Lawndale. He determined that the fire began in a vacant bathroom of an apartment located on the third floor. The bathroom contained no materials that would sustain combustion. Lieutenant Burns testified that the fire burned downward and said that "heat or fire never burns downward unless there is an outside force of some sort, and in this particular instance it would be an accelerant." (R. 168-169) His conclusion was that the fire was not of natural origin.

THE TRIAL AND THE APPEAL

The petitioner and Wolf were charged with the crime of arson, committed with intent to defraud an insurer, in violation of Illinois Revised Statutes (1969), ch. 38, sec. 20-1(b) of the Criminal Code. They were also charged with conspiracy to commit arson in violation of Illinois Revised Statutes (1969), ch. 38, sec. 8-2. Wolf, alone, was charged with arson (burning a building without the owner's consent) in violation of Illinois Revised Statutes (1969), ch. 38 sec. 20-1(a). On May 11,

1973, the grand jury returned the instant indictment (No. 73-1441). (R. C4-7) The petitioner and Wolf hired one private counsel to conduct their defense. During the presentation of the State's case in chief, Wolf procured additional counsel to represent him during the trial. (R. 202) Count one of the indictment charging Wolf with arson, in that he burned a building without the owner's consent, was *nolle prossed* at the close of the State's case in chief.

Both petitioner and Wolf pleaded not guilty. Petitioner did not testify and Wolf denied his presence at the scene of the fire. Neither petitioner, nor his codefendant Wolf, tried to establish his defense by implicating the other.

After a bench trial, both the petitioner and Wolf were found guilty of arson, with intent to defraud an insurer, and conspiracy to commit arson. A motion in arrest of judgment on the conspiracy count was granted on the basis that the applicable statute of limitations had expired. The petitioner was sentenced to serve a term of 1½ to 4½ years in the Illinois State Penitentiary and was ordered to pay a fine of $10,000.

Following the petitioner's conviction he filed a timely appeal to the Illinois Appellate Court, First District. That court reversed the petitioner's conviction for arson with the intent to defraud an insurer on the basis that petitioner had been denied the effective assistance of counsel due to counsel's alleged conflict of interest and on the basis that the State failed to prove petitioner guilty beyond a reasonable doubt. *People* v. *Berland*, 52 Ill. App. 3d 96, 376 N.E. 2d 181 (1st Dist. 1977).

Pursuant to the provisions of Illinois Revised Statutes (1977) ch. 110A, sec. 615, the People of the State of Illinois petitioned the Illinois Supreme Court for leave to appeal the judgment of the Illinois Appellate Court, First District. The Illinois Supreme Court granted leave to appeal and reversed the judgment of the Illinois Appellate Court, First District, *People* v. *Berland*, 74 Ill. 2d 286, 385 N.E. 2d 649 (1979). In

its opinion the Illinois Supreme Court held *inter alia,* that there was no actual conflict of interest in privately retained defense counsel's joint representation of Petitioner and his codefendant, that counsel's representation was competent and that the petitioner was proved guilty of arson with intent to defraud an insurer beyond a reasonable doubt on the theory of accountability.

The petitioner filed a petition for rehearing in the Illinois Supreme Court in which he challenged, for the first time, the State's right to petition the Illinois Supreme Court for leave to appeal a judgment of the Appellate Court wherein the Appellate Court reverses a defendant's conviction for, among other things, the sufficiency of the evidence. The petitioner's petition for rehearing was summarily denied, without comment. It is from the decision of the Illinois Supreme Court that the petitioner brings the petition for certiorari.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THE DECISION OF THE ILLINOIS APPELLATE COURT REVERSING THE CONVICTION OF PETITIONER FOR ARSON WITH INTENT TO DEFRAUD AN INSURER DID NOT OPERATE AS AN ACQUITTAL OF THE PETITIONER; THEREFORE, THE ILLINOIS SUPREME COURT'S GRANT OF DISCRETIONARY REVIEW AND SUBSEQUENT REVERSAL OF THE DECISION OF THE APPELLATE COURT WAS PROPER AND DID NOT OFFEND THE PROSCRIPTIONS AGAINST DOUBLE JEOPARDY. THIS ISSUE WAS NOT RAISED UNTIL THE PETITION FOR REHEARING IN THE ILLINOIS SUPREME COURT AND IS THEREFORE WAIVED FOR PURPOSES OF REVIEW IN THIS COURT.

The petitioner first requests that a Writ of Certiorari be granted by this Court on the basis that the Illinois Supreme Court's grant of discretionary review pursuant to the petition for leave to appeal filed by the People of the State of Illinois from the decision of the Illinois Appellate Court, First District, offends the proscriptions against double jeopardy contained in Article VI, Section 6, of the Illinois Constitution and the Fifth Amendment of the United States Constitution. The respondent maintains that the petition for certiorari is improperly brought upon this basis, for the petitioner waived the issue by raising it for the first time in a petition for rehearing in the Illinois Supreme Court, has failed to show that the Illinois Supreme Court has decided a federal question not theretofore determined by this Court, or that the Illinois Supreme Court has resolved this question in a way probably not in accord with the applicable decisions of this Court. *See* Rule 19(1)(a) of the Supreme Court of the United States. The respondent maintains

that the judgment of the Illinois Appellate Court which reversed the petitioner's conviction for arson with intent to defraud an insurer did not operate as an acquittal of the petitioner. The respondent further maintains that the Illinois Supreme Court's grant of discretionary review of the decision of the Illinois Appellate Court, First District, and the Illinois Supreme Court's subsequent reversal of the Appellate Court's decision without remandment was completely in accord with Illinois Supreme Court rules and did not violate the double jeopardy proscriptions of the Illinois and United States Constitutions.

The respondent observes, at the outset that this particular issue was not raised in the Illinois Supreme Court at the time petitioner filed his brief in the Illinois Supreme Court. In fact, the first time this issue was raised by the petitioner was in a petition for rehearing in the Illinois Supreme Court following that Court's reversal of the decision of the Illinois Appellate Court, First District, and the reinstating of the trial court's judgment of conviction. The respondent notes that in Illinois a response to a petition for rehearing is not permitted unless ordered by the court. Ill. Rev. Stat. 1977, ch. 110A, sec. 367. The People of the State of Illinois were not requested to file a response to the petitioner's petition for rehearing, so none was filed. Moreover, the law in Illinois is clear that a new contention "cannot, for the first time be urged in a petition for rehearing." *People* v. *Mallett*, 45 Ill. 2d 388, 259 N.E. 2d 241 (1970).

On February 20, 1979, the Illinois Supreme Court summarily denied the petitioner's petition for rehearing without addressing the issue. The respondent therefore maintains that the petitioner has waived this contention for purposes of review by this Court. The respondent submits that the judgment of the Illinois Supreme Court is not reviewable by this Court where it is raised for the first time in a petition for rehearing in the

Illinois Supreme Court, especially where the higher State court's denial, as in the instant case, was summary in nature. *Hanson* v. *Denckla,* 357 U.S. 235, 243, 244, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

Although the petitioner has failed to show the need for this Court, in its sound discretion, to grant his petition, the respondent, confident that the Illinois Supreme Court has properly disposed of this issue in its summary denial of petitioner's petition for rehearing, will briefly address the merits. The respondents maintain that the Illinois Supreme Court has on several previous occasions reviewed the exact issue raised by the petitioner in his petition for a writ of certiorari, and has resolved the issue in favor of the respondent. *People* v. *Schwartz,* 58 Ill. 2d 274, 319 N.E. 2d 33 (1974); *People* v. *Powell,* 72 Ill. 2d 50, 377 N.E. 2d 803 (1978) cert. den. ____ U.S. ____, 59 L. Ed. 2d 455, 99 S. Ct. 1214 (1979). In both *Schwartz* and *Powell,* the defendants attacked the jurisdiction of the Illinois Supreme Court to review decisions of the Illinois Appellate Court which reversed defendant's convictions due to an alleged evidentiary insufficiency. The Illinois Supreme Court in both *Schwartz* and *Powell,* held that the proscriptions against double jeopardy are not affected, where in a two-tier system of Appellate Review such as exists in Illinois, the State pursuant to Illinois Supreme Court Rule is given a right to petition for leave to appeal to the Supreme Court from the Appellate Court. Ill. Rev. Stat. 1977, ch. 110A, sec. 315. The Illinois Supreme Court stated both in *Schwartz* and *Powell,* that the defendants were *convicted* in the trial court, not acquitted, and that it was the Appellate Court which found the evidence to be insufficient. The Illinois Supreme Court held that the question is the finality of the Appellate Court's judgment, and, so long as discretionary review is available to the State, the process of review has not been completed. *Schwartz, supra,* at 276; *Powell, supra,* at 60. In *Schwartz,* the Illinois Supreme Court reversed the cause with remandment to the Appellate

Court with directions to consider the remaining issues. In both *Powell* and the instant case the Illinois Supreme Court reversed the judgment of the Appellate Court and affirmed the decision of the Circuit Court of Cook County. Neither in *Schwartz*, nor in *Powell*, nor in the instant case, did the Illinois Supreme Court order the defendant to be tried anew. cf. *Burks* v. *United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978).

In *United States* v. *Wilson*, 420 U.S. 332, 43 L. Ed. 2d 232, 95 S. Ct. 1013 (1975), this Court held that when a trial judge, on a post-verdict motion, rules in favor of a defendant after he has been found guilty by the trier of fact, the government may appeal the trial court's ruling without contravening the Double Jeopardy Clause of the United States Constitution. This Court stated, "The constitutional protection against government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense." *Wilson*, at 336. The Court went on to say that where reversal on appeal would merely cause the jury's verdict to be reinstated the proscription against double jeopardy is not violated. This Court further stated that even where an indictment is dismissed and a defendant is discharged, "it is well settled that an Appellate Court's order reversing a conviction is subject to further review." *Wilson*, at 345. The respondent maintains that this Court's opinion in *Wilson* is controlling and clearly shows that the discretionary review allowed in this case does not offend the double jeopardy clauses of either the Illinois or United States Constitutions.

In seeking to have certiorari granted on this issue, the respondent relies on this Court's opinion in *Burks* v. *United States*, *supra*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978). The respondent submits that *Burks* is totally inapplicable to the instant case. In *Burks*, this Court specifically limited its holding providing that the double jeopardy clause prohibits the *retrial* of a defendant after the reviewing court has determined the evidence to be insufficient. This Court in *Burks* did not hold

that the government was to be precluded from applying for discretionary review following an Appellate Court's determination that the evidence presented at trial was insufficient to sustain a conviction. A new trial was not ordered in the instant case and therefore the petitioner will not be placed again in jeopardy.

For all of the reasons noted above, the respondent urges that this issue was properly decided by the Illinois Supreme Court, and because the petitioner has failed to show any need for this Court to grant his petition for certiorari, his petition should be denied.

II.

THE DECISION OF THE SUPREME COURT OF ILLINOIS AFFIRMING THE JUDGMENT OF THE TRIAL COURT THAT THE PETITIONER WAS GUILTY OF ARSON WITH INTENT TO DEFRAUD AN INSURER WAS SUPPORTED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THE RECORD DOES NOT SUPPORT ANY REASONABLE HYPOTHESIS OF PETITIONER'S INNOCENCE. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERIORARI.

The petitioner next requests that a Writ of Certiorari be granted by this Court on the ground that the evidence adduced against him in the trial court is insufficient to support his conviction for arson with intent to defraud an insurer. In answer, the respondent maintains that a Writ of Certiorari is improperly sought upon this basis.

In essence, the petitioner is asking this Court to review the lengthly trial record and accompanying exhibits (over 3,000 pages) to see if this Court can find what the Illinois Supreme Court could not find, a reasonable hypothesis of the petitioner's

innocence. This Court has repeatedly held, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 (1925). "There are no exceptional circumstances of any kind that would justify" this Court in rejecting the findings of the Illinois Supreme Court, for those findings are clearly supported by the overwhelming weight of the evidence. *Fry Roofing* v. *Wood*, 344 U.S. 157, 160, 73 S. Ct. 204, 97 L. Ed. 2d 168 (1952). Although the petitioner has failed to show the need for this Court, in its sound discretion, to grant his petition, the respondent, confident that the Illinois Supreme Court has properly determined this issue, will briefly address the merits.

The petitioner's argument on this point, rather than, reviewing the overwhelming circumstantial evidence adduced against the petitioner, merely states that the evidence was "woefully inadequate" and then provides the citation to two totally inapplicable cases. Yet, Judge Aspen, the trial court judge, who carefully weighed the evidence, found that there was no reasonable hypothesis of innocence. *Holland* v. *United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954); *People* v. *Taylor*, 32 Ill. 2d 165, 204 N.E. 2d 734 (1965).

The Illinois Supreme Court, in reversing the decision of the Illinois Appellate Court, noted the superior position of the trial court to observe the witnesses and reiterated the maxim that the reviewing court should not substitute its judgment for that of the trier of fact. *People* v. *Berland*, 74 Ill. 2d 286, 306, 385 N.E.2d 649 (1979). The evidence clearly shows that petitioner was "accountable for the offense even though he did not physically set fire to the building." *Berland, supra*, at 309; Ill. Rev. Stat. 1969, ch. 38, sec. 5-2.

The evidence at trial clearly showed that petitioner's codefendant, Louis Wolf, set the arson fire which resulted in the destruction of the premises located at 715 South Lawndale. He was observed by two eyewitnesses who had seen him on

previous occasions, enter the premises, with a full gasoline can and was then observed leaving, carrying an empty gasoline can. Although Wolf provided an alibi defense the Illinois Supreme Court termed that alibi a "recent concoction," being of "recent origin", and stated that the "alibi was impeached." *Berland, supra*, 74 Ill. 2d at 307.

The evidence presented to the trial court showed that petitioner and co-defendant Wolf were inextricably interwined in the purchase and management of the subject premises. Wolf was intimately involved in the purchase of the property and in fact he purchased the property alternatively in his name or the name of his nominee. (R. 477-478)

Both the petitioner and Wolf were involved in the chain of title to 715 South Lawndale. At one point the beneficiary of the trust was listed as "Fred Cooper." (People's Ex. No. 5, at 68; see also People's Ex. No. 14) "Fred Cooper" was an alias used by Albert Berland. (People's Ex. No. 5, at 70) Significantly, Cooper's address was given as 1614 South Kedzie and 2840 North Boadway. (People's Ex. No. 14) Both of these locations were in fact business addresses of Louis Wolf. (People Ex. No. 4, at 56; People's Ex. No. 3, at 72, 75)

Wolf loaned petitioner some money and petitioner executed an assignment of collateral in the property at 715 South Lawndale to William Berke until petitioner had repaid Wolf. (People's Ex. No. 5, at 143; People's Ex. No. 2 at 43; R. 503-5) Berke was Wolf's nephew and Wolf listed William Berke as a beneficiary for the purpose of insuring that property would pass to Berke if Wolf died. (People's Exhibit No. 2 at 16, 39)

During the two years prior to the fire, petitioner's proceeds from the rental property had steadily diminished. In the month prior to the fire, only 2 of the 4 tenants were paying rent and the building was two-thirds vacant. (People's Exhibit No. 5 at 5, 104)

The facts also show that petitioner's application for fire insurance on the subject property contained false information and the notary seal on that policy application had been forged as the notary had been dead for 9 months at the time his seal was affixed. (People's Pet. at 37) The application for the fire insurance policy on the subject premises required that the applicant list his history of fire losses in the five years prior to the date of the application. The petitioner entered the word "none" in response to the question. In fact, the evidence showed that since 1967 and prior to the date of the fire, November 19, 1969, the petitioner had sustained fire losses on eight occasions. (People's Exhibit No. 5 at 15, 17, 18, 20, 21, 24, 26, 27, 28) The petitioner's signature appeared on the application.

Although, the petition for a writ of certiorari states, "We view this fact as incidental since Berland never denied signing the application" (Pet. for Cert. at 9, n. 7), the respondent submits that far from being "incidental," the false statement on the policy application clearly evinced the petitioner's intent to defraud the insurance company.

The respondent would further note that in addition to the fraudulent application it appeared that the amount of the insurance procured, $100,000, was greatly in excess of the value of the property and certainly far in excess of the purchase price of $18,000. The petitioner, in the trial court attempted to show that the building was not over insured. However, the trial court recognized that the amount of insurance was irrelevant because, "the gist of the fraud upon the insuror was the burning of the building by the insured regardless of what the replacement cost was." (R. 897)

The petitioner had been cited by the City of Chicago for over 35 building code violations concerning the subject premises. The City of Chicago had asked for a fine of $6,800 or the correction of the code violations. The cause was continued until November 20, 1969, but on November 19, 1969, the day before the scheduled hearing the building was set on fire and burned.

The cases cited by the petitioner in support of his position are distinguishable both on their facts and on the law. In the instant case there was a wealth of evidence tying the petitioner to the arson fire. In the instant case not only did the evidence show the petitioner's motive and procurement of an excessive amount of insurance but the evidence in the instant case showed the fraudulent procurement of the insurance and the eyewitnesses testimony that the codefendant, the man from whose office the false notary seal was obtained and the man who was intertwined with petitioner in the purchase and management of the building, carried a full gasoline can into the premises and left with an empty one. A short time later the blaze erupted.

There is absolutely no reason that can be inferred from any testimony as to why Wolf would burn the building without Berland's consent. It is clear from the evidence that Wolf knew of Berland's problems with 715 South Lawndale and had tried to help him gain some financial reward from his investment. It is clear that Wolf burned the building at 715 South Lawndale. It is equally clear that Wolf would not have burned the building without Berland's assent. For Wolf to have taken such an action was out of the question. He testified that he had been friends with Berland for over thirty years. There is no evidence that they had any type of disagreement, or that Berland owed Wolf any money. In short, everything that Wolf did regarding the subject building was done with the advice, consent, acquiescence and aid of petitioner. They were in the scheme together.

There is no reasonable hypothesis consistent with the petitioner's innocence. The respondent maintains that because this issue was properly decided by the Illinois Supreme Court on the basis of the trial record, the petitioner has failed to show any need for this Court to grant his petition for a writ of certiorari and entertain a *de novo* review of the facts in this case. Therefore, the petition for certiorari should be denied.

III.

THE PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL WAS PRIVATELY RETAINED, THE PETITIONER'S DEFENSE AT TRIAL DID NOT CONFLICT WITH THAT OF THE CODEFENDANT AND THERE IS NO SHOWING THAT A DIFFERENT RESULT WOULD HAVE OBTAINED HAD THE PETITIONER AND THE CODEFENDANT PROCURED SEPARATE COUNSEL. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI.

The petitioner further seeks the granting of a writ of certiorari by this Court, and claims that the facts in the instant case would allow resolution of the questions of how strong a showing of conflict of interest must be and the scope of the duty of the trial court in cases where jointly represented defendants have allegedly conflicting interests. (Pet. for Cert. at 21) The respondent maintains, however, that the facts in the instant case neither permit the formulation, nor the resolution of either question posed by the petitioner. Moreover, the respondent notes at the outset that a petition for a writ of certiorari is improperly brought upon this basis, for the petitioner has failed to show that the Illinois Supreme Court has decided such a question in a way probably not in accord with applicable decisions of this Court. See, Rule 19(1)(a) of the Supreme Court of the United States. Although the petitioner has completely failed to show the need for this Court, in its sound discretion, to grant his petition, the respondent, believing that the Illinois Supreme Court has properly determined this issue upon the merits will briefly address those merits.

The Illinois Supreme Court in its opinion below in the instant case, held that "a defendant must show actual conflict of interest manifested at trial in order to prevail in a constitutional claim of ineffective assistance of counsel due to joint representa-

tion of co-defendants by a single attorney." *People* v. *Berland*, 74 Ill.2d 286, 300, 385 N.E.2d 649 (1978). The petitioner has not shown, and cannot show, that an actual conflict of interest existed under the instant facts.

The indictment returned against the petitioner and his codefendant consisted of three counts. Only counts one and two are relevant here. Count one charged Louis Wolf with arson, in that he burned the apartment building located at 715 South Lawndale, Chicago, without the consent of the owner, in violation of Illinois Revised Statutes (1969), Ch. 38, § 20-1(a). (R. C4) Count two charged both Louis Wolf and petitioner Albert Berland, with the crime of arson, committed with the intent to defraud an insurer (R. C5), in violation of Illinois Revised Statutes, 1969, Ch. 38 § 20-1(b). Count one of the indictment, which charged Wolf with burning a building owned by Albert Berland, without his consent, was *nolle prossed* on the People's motion at the close of the People's case when the court stated that it would preclude proof on both counts one and two. (R. 321) The petitioner and his codefendant were convicted on count two of the indictment which charged them with arson with intent to defraud an insurer. Petitioner and his codefendant were represented at trial by one, privately retained counsel. New privately retained counsel represented the petitioner during the post-trial motions and on appeal.

The Illinois Supreme Court held that the record in the instant case was "devoid of any evidence of an actual conflict of interest." *Berland, supra,* 74 Ill. 2d at 300. The respondent submits that the Illinois Supreme Court was clearly correct.

Wolf's defense was that he was not present at 715 South Lawndale at the time the crime occurred. He stated that he did not know about the fire until several days to a week after the loss. (R. 489) Wolf presented an alibi defense to show that he was at the law office of Mr. Samuel Siegel on the morning of the fire. Petitioner did not present an alibi defense and the trial

court acknowledged that there was no evidence showing petitioner's presence at the scene of the fire. Petitioner's defense was basically one of denial and he presented testimony in an attempt to show that the building was not over insured in an effort to negate the prosecution's evidence of motive. Clearly, there was no conflict in these defenses and neither defendant sought to implicate the other in any manner. *People* v. *Somerville*, 42 Ill.2d 1, 9, 245 N.E.2d 461 (1969); *People* v. *Craig*, 47 Ill. App.3d 242, 361 N.E.2d 736 (1st Dist. 1977).

The petitioner speculates that defense counsel's representation of him was hampered because of privately retained counsel's representation of the codefendant.[2] The Illinois Supreme Court has specifically rejected creating a "conflict of interest out of mere conjecture as to what might have been shown." *People* v. *Somerville*, 42 Ill. 2d 1, 245 N.E.2d 461 (1969).

In the instant case, neither Wolf nor petitioner was attempting to establish his defense by implicating the other. In fact, petitioner was benefitted by Wolf's testimony wherein he disclaimed presence at the premises in question on the morning of the fire, as that testimony would if anything tend to negate petitioner's involvement in the crime. Moreover, there was no reason to assume that petitioner would ever try to show that Wolf burned the building without his consent, had he been represented by different counsel or even if he had been tried separately.

There is absolutely no reason that can be inferred from any testimony as to why Wolf would burn the building without petitioner's consent. For Wolf to have taken such an action is

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[2] In *United States* v. *Steele*, 576 R.2d 111 (6th Cir. 1978), the sixth circuit court of appeals declined to adopt a *per se* rule under the sixth amendment requiring jointly represented defendants to be advised of their right to separate counsel in cases where, as here, joint counsel was privately retained.

out of the question. He testified that he had been friends with petitioner for over thirty years. There is no evidence that they had any type of disagreement, or that petitioner owed Wolf any money. Clearly, any allegation of conflict of interest is pure speculation. Their defenses did not conflict with one another.

The Illinois Supreme Court's position of refusing to reverse a conviction because of speculation as to what might have been has been followed by a number of Federal Circuit Courts of Appeals. *United States* v. *Medel*, 592, F.2d 1305 (5th Cir. 1979); *United States* v. *Steele*, 576 F.2d 111 (6th Cir. 1978) cert. den. 99. S.Ct. 313; *United States* v. *Mandell*, 525 F.2d 671 (7th Cir. 1975); *Smith* v. *Regan*, 583 F.2d 72 (2d Cir. 1978); cert. den. 435 U.S. 406. *United States* v. *Eaglin*, 571 F.2d 1069 (9th Cir. 1977) cert. den. 435 U.S. 406. *United States* v. *Valenzuela*, 521 F.2d 414 (8th Cir. 1975) cert. den. 424 U.S. 916 (1976).

Moreover, the petitioner's cause was advanced by counsel without sacrificing his interests in favor of the codefendant before trial, during the prosecution's case in chief, and during the defense case in chief. Counsel conducted a pre-trial investigation, filed and argued pre-trial motions, made objections to various exhibits, argued points of law, cross-examined the State's witnesses and presented a defense. Additionally, during the presentation on the State's case in chief defendant Wolf was represented by a second privately retained attorney. (R. 259) At the conclusion of those arguments the State *nolle prossed* count one of the indictment. (R. 321) Therefore, at the time the defense presented its case the only count on which the defendant and the petitioner were being tried was count two.

The respondent submits that the instant case is precisely the type of case where a joint representation is more effective for the defendants. As the Court of Appeals said in *United States* v. *Medel*, 592 F.2d 1305, 1312 (5th Cir. 1979)," when the parties' interests were so closely related, if either had suggested that the other party was guilty, then this allegation might have worked to the detriment of the accusing party." As

Mr. Justice Frankfurter said in his dissent in *Glasser* v. *United States*, 315 U.S. 60, 92, 62 S.Ct. 457 86 L.Ed. 680 (1942), quoted approvingly in *Holloway* v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed2d 426 (1978), "Joint representation is a means of ensuring against reciprocal recrimination. A common defense often gives strength against a common attack." This Court in *Holloway* clearly enunicated that, "Requiring or permitting a single attorney to represent co-defendants, . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway supra*, 435 U.S. at 482.

The Illinois Supreme Court extensively discussed both the holdings in *Glasser* v. *United States*, *supra*, and *Holloway*, *supra*, in their opinion in *Berland*, *supra*.

> The court has refused an invitation to require trial judges to ascertain that co-defendants' decisions to proceed with one attorney are informed (*People* v. *Somerville* (1969), 42 Ill. 2d 1, 10). The crucial determination is whether there is a conflict, since absent such conflict there is no threat to a defendant's right to the assistance of separate counsel. Neither *Glasser* v. *United States*, (1942), 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457, nor *Holloway* v. *Arkansas*, (1978), 435 U.S. 475, 55 L.Ed. 2d 426, 98 S.Ct. 1173, indicate that a pretrial inquiry and waiver of separate counsel is mandated in all cases of joint representation. Because joint representation is not per se unconstitutional there is no need to require judicial inquiry until the conflict appears. The language in Glasser and Holloway that it is the duty of the trial judge to see that the trial is conducted with solicitude for the essential rights of the accused is directed specifically to trial court insistence upon joint representation where counsel or the defendant has requested separate representation. Since there was no conflict here, judicial inquiry was not required. *Berland*, at 305.

There was no objection to joint representation voiced by privately retained counsel, nor by the petitioner or his co-defendant in the instant case and there was no actual conflict.

The facts of the instant case, therefore, do not fall within the ambit of *Holloway* v. *Arkansas, supra,* and render *Holloway* inapplicable to the case at bar. See *Thacker* v. *Bordenkircher,* 590 F.2d 640 (6th Cir. 1979).

The petitioner urges that this Court set guidelines for all Federal and State Courts to follow in situations where co-defendants are jointly represented. He asks that an "affirmative duty" be placed on the trial judge "to assure that criminal defendants represented by single counsel are advised of the possibility of conflicting interests." (Pet. at 21) The petitioner urges as a guideline to implement the standards that this Court adopt the reasoning of the Court of Appeals in the *United States* v. *Gaines,* 529 F.2d 1038 (7th Cir. 1976). Yet, the *Gaines* Court stated that not until an "actual conflict appears" . . . must "the Court . . . bring the fact of its existence," to the attention of the parties. *Gaines, supra,* at 1044. There being no actual conflict in the instant case (*People* v. *Berland, supra,* 74 Ill.2d at 300), the *Gaines* rationale cannot possibly apply in the instant case. Moreover, as the Court of Appeals said in *United States* v. *Mandell, supra,* 525 F.2d 671 (7th Cir. 1975) cert. den. 423 U.S. 1049 (1976), "the primary responsibility for the ascertainment and avoidance of conflict situations must lie with the members of the bar. Accord, *United States* v. *Paz-Sierra,* 367 F.2d 930, 932-933 (2d Cir. 1966); *United States* v. *Boudreaux,* 502 F.2d 557 (5th Cir. 1974). This Court in *Holloway* v. *Arkansas, supra,* held that "an attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." 98 S.Ct. 1173 at 1179.

It is clear that those Courts which have placed a heavy burden on the trial judges rather than on trial counsel to identify conflicts and advise the parties have done so pursuant to their "supervisory powers", rather than on constitutional grounds. *United States* v. *Foster,* 469 F.2d 1, 4 (1st Cir. 1972);

United States v. *Cox*, 580 F.2d 317 (8th Cir. 1978) explaining *United States* v. *Lawriw*, 568 F.2d 98 (8th Cir. 1977); see *Lollar* v. *United States*, 376 F.2d 243 (D.C. Cir. 1967) A number of the Circuit Courts of Appeal have declined to exercise their supervisory powers and implement an affirmative inquiry requirement on the trial court. See *United States* v. *Mandell*, *supra*, 525 F.2d 671 (7th Cir. 1975) and the cases cited therein at 676.

For all of the above stated reasons, the respondent urges that because the Illinois Supreme Court properly decided this issue on the merits, because the decision of the Illinois Supreme Court is in accord with the decisions of this Court, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of Certiorari, such petition should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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